PHYSICAL DISORDER, CONSCIOUSNESS, AND CRIMINAL LIABILITY

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It is a sign of the times that theories of complex and multiple causation have replaced simplistic and homogeneous replies to the question "why?"1 As part of the acceptance of a world that offers few simple answers to pressing problems, systematic investigations have made it inescapably clear that criminal behavior too springs from heterogeneous sources.2 Thus criminology has finally abandoned simple explanations and come to realize that people commit crimes for different reasons.

Within this concept of multiple causation is found the influence of biological facts—the individual physical endowment of the criminal actor. One of the major reasons why some people commit crimes relates to their biochemical, physiological, neurological, and anatomical peculiarities.3 This, of course, does not rule out recognition of social or psychological factors in the background of crime. These influences, emanating from relationships with individuals or groups in the external environment, must be recognized as operative, even if they cannot be accepted as being endemic or exclusive in their impact. In the present state of knowledge, the most sensible view seems to be the assumption of a dynamic interplay of external and internal environment as the genesis of criminal behavior.4

In some cases, however, one or the other of these environments may be primarily responsible for the behavior, as when an individual with no observable psychological or biological peculiarities succumbs to the influence of antisocial companions. Our concern here is with cases at the other end of the biosocial spectrum, namely, those instances in which pathological internal environments appear to dominate—in which the major causative role may be assigned to biological conditions.⁵

1. Even theories of why people are poor have progressed beyond simple monolithic explanations. See Galbraith, *The Poverty of Nations*, Atlantic Monthly, Oct. 1962,

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^{2.} See Glueck, Theory and Fact in Criminology, 7 British J. of Delinquency

<sup>92, 105 (1956).

3.</sup> See Fox, Delinquency and Biology, 16 MIAMI L. Rev. 65 (1961); Podolsky, The Chemical Brew of Criminal Behavior, 45 J. CRIM. L., C. & P.S. 675 (1955).

4. Cf. Dewan & Spaulding, The Organic Psychoses: A Guide to Diagnosis 8 (1958): "[O]ne must keep in mind the basic principle of multiple aetiology. Organic factors are operating synergestically with social and psychological stresses in a particular constitution, all factors contributing in varying degrees to the genesis of the breakdown and to the presenting clinical picture."

5. Cf. Adler, Biological and Pathological Aspects of Behavior Disorders, 7 American J. of Psychiatry 507, 509-10 (1927):

THE RELATION OF CRIME AND PHYSICAL DISORDER

The precise manner by which physical factors may produce criminal behavior is a threshhold question for understanding the scope of the problem. Basic is the fact, seemingly beyond scientific dispute, that the functioning of the human brain as a bodily organ plays a vital role in producing conduct.⁶ Thus, conditions such as epilepsy, cerebral tumor, head trauma, encephalitis, and cerebral atherosclerosis, which directly impinge on normal brain functioning, may be crucially involved in impaired or aberrant conduct.7 In addition, reports of scientific investigators make clear the symbiotic relationship between the functioning of the brain and the functioning of other organs and systems in the body, so that occurrences in the latter almost invariably affect the former.8 Thus, glandular disorders, metabolic dysfunctions, and circulatory breakdowns all communicate their pathologies to brain functions.9

The nature or "essence" of the effects produced by such brain tissue or nonbrain tissue disorders may be described in several ways. Indicating the

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especially in the case of the so-called equilibrium reactions, are well known. We might, therefore, take from biology some of the general principles pertinent to our own enquiry. Some of the rules of biology applicable here are the following:

First, that a healthy organism is able to maintain equilibrium with the environment provided the variations of the environment do not exceed the outside limits of the organism's ability to adjust. And it might be added that the limits of ability in a healthy organism are very wide; that there is an ample margin of safety; one has only to think of the amazing numbers of babies that have survived under the conditions of prehistoric Briton or of modern slums. The breakdown of adjustment, therefore, indicates either that the individual is weak or disordered, or that the environment is unfavorable and to an extent dangerous or disordered, or that the environment is unfavorable and to an extent dangerous to the individual. In view of the relatively stable condition of the environment, both general and social, especially in our modern civilization, we will normally give preference to the belief that the inadequacies of the individual rather than of the environment are at the basis of the disordered behavior.

or the environment are at the basis of the disordered behavior.

A second biological principle applicable here is that the further removed from health the organism, the lower the threshold at which disequilibrium sets in. Even the normal variations of environment may present more of a strain than the organism can meet if it is very inadequate in one or more respects. The success of many other individuals living under similar conditions strengthens the probability that variations in the individual characteristics are responsible for the discrepancies in behavior.

- 6. See generally Gerard, Neurophysiology: Brain and Behavior, in 2 American Handbook of Psychiatry 1620 (Arieti ed. 1959).
- 7. See, e.g., Brill, Postencephalitic Psychiatric Conditions, in 2 id. at 1163, 1167-68.

 8. "Adverse conditions affect all the organs of the body but the brain and the thought processes are among the earliest points of attack. No matter what the nature of the abnormality, the brain and mentation seem to be affected." Himwich, Thought Processes as Related to Brain Metabolism in Certain Abnormal Conditions, 114 J. of Nervous & Mental Disease 450 (1951). See also Cobb, Foundations of Neuro-psychiatry 124-27 (6th ed. 1958).
- 9. Biology is also involved in criminogenesis apart from the presence of recognizable pathologies such as those mentioned in the text. There is reason to believe that relevant pathologies such as those mentioned in the text. There is reason to believe that relevant personality characteristics, such as assertiveness, acquisitiveness, destructiveness, and conventionality, are rooted in individual constitutions so that in the complexities of those cases in which such characteristics combine with provoking psychosocial circumstances to produce the combustion that is criminality, it is proper to recognize that the biological components of constitution are crucially involved. See Fox, *supra* note 3, at 81-82.

changes in strict biological terms—biochemical, anatomical, or physiological is one way. Accordingly, one may say that a failure of relevant bodily mechanisms to supply enough glucose to the brain produces a diminished release of energy from nerve cells. 10 A second way is to describe the mental symptoms accompanying the biological conditions created in the central nervous system, e.g., the individual loses consciousness or he experiences hallucinations, memory impairment, anxiety, irritability, fearfulness, etc. 11 Or, third, the symptoms may be noted in behavioral terms. 12 No method of description is, of course, any more or less valid than any other and a complete clinical picture would use all dimensions. The "essence" lies in completeness. We are concerned here with use of these several dimensions in the assessment of criminal liability.

That there are instances of biologically conditioned criminality is verified by recorded experience. Illustrations of crimes in which primary causal significance has been assigned to an organic pathology of one sort or another would include a wide range of offenses and relate to such conditions as epileptic disorders, 13 hypoglycemia, 14 cerebral tumor, 15 arteriosclerosis, 16 etc.

The number of accused persons whose criminal conduct might be biologically conditioned is probably quite large since the number of physical disorders that are capable of producing criminal behavior is itself extensive.¹⁷ Which disorders these are can be approximated by noting those aetiologically involved in what are called the organic psychoses.18 This is not to say that all

^{10.} See Caughey & Garrod, Coma and Allied Disturbances of Consciousness in Hypopituitarism, 1954 BRITISH MEDICAL J. 554, 558.

^{11. &}quot;Organic syndromes tend to fall into two groupings: the deliria and the dementias.

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12. Delirium is usually an acute, transient psychiatric disturbance frequently characterized by clouded sensorium, disorientation, irrational thinking, defective judgment, excited, overactive, impulsive behavior, fearfulness, and illusions and hallucinations, especially visual. It is almost invariably an indication of some physical disorder but on rare occasions one does see delirium associated with severe anxiety or other exhausting emotional disturbance in the absence of physical disease." Dewan & Spaulding, op. cit. supra note 4, at 82-83.

12. See Dewan's and Spaulding's inclusion of impulsive behavior, in note 11 supra. See also, e.g., Cleghorn, Endocrine Influence on Personality and Behavior, in The Biology of Mental Health and Disease 265 (Milbank Memorial Fund ed. 1952); Sherlock, Summerskill, White & Phear, Portal-Systemic Encephalopathy: Neurological Complications of Liver Disease, 1954 Lancer 453, 454.

13. See People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).

14. Dr. Joseph Wilder lists the following offenses as having been committed during a hypoglycemic episode: disorderly conduct; assault and battery; attempted suicide and homicide; cruelty against children and spouse; sexual perversions and agressions; false fire alarms; drunkenness; embezzlement; petty larceny; willful destruction of property; arson; slander; and traffic offenses. Wilder, Sugar Metabolism in Its Relation to Criminology, in Correctional Psychology 98, 109 (Lindner & Seliger ed. 1947). See also Adlersberg & Dolger, Medico-Legal Problems of Hypoglycemic Reactions in Diabetes, 12 Annals of Internal Medicine 1804, 1807 (1939); Hill & Sargent, A Case of Matricide, 1943 Lancet 526.

15. See Regina v. Charlson, [1955] 1 Weekly L.R. 317 (Chester Assizes).

16. See Regina v. Kemp, [1956] 3 Weekly L.R. 724 (Bristol Assizes).

17. Whether thes

a different question.

^{18.} In presenting the organic bases of psychosis and mental deficiency, Dewan and

cases in which an organic disorder underlies the actor's conduct are instances of psychosis. It is clear both in experience and in reason that the organic factors produce effects in varying degrees, and the kind of behavior that is criminal may be found as a symptom well before the diagnosis of psychosis would be pronounced.19

This, of course, is not scientifically novel; it is hornbook psychiatry.²⁰ Nor is the assertion that crime may be perpetrated under the influence of physical disease or disability unknown to legal history. For example, in the trial of James Hadfield,21 Lord Erskine was successful in a defense based wholly upon head trauma received in war.²² He even took pains to distinguish this from a psychogenic disorder.²³

Spaulding, op. cit. supra note 4, at 8-12, include: metabolic disorders, id. at 16-34; disordered blood supply of cerebral cells, id. at 35-40; mechanical stresses interfering with cerebral functioning, id. at 41-45; infections, id. at 46-50; intoxications, id. at 51-60; degenerations of cerebral tissue, id. at 61-66; and paroxysmal cerebral dysrhythmias

(epilepsy), id. at 67-71.

19. "It is well to realize that there may be great variability in the degree of severity of delirious states, and, furthermore, the symptoms . . . need not all be present in the individual case. . . . The dementing process may cease with only minimal damage or may proceed to complete deterioration of the personality." Dewan & Spaulding, op. cit. supra note 4, at 82-83. See also the principle of genetic gradients which postulates that whenever any genetically derived defect of gross abnormality appears it may be assumed that there are individuals all along the range from normality to the known abnormality. Williams, Biochemical Individuality 13 (1956), discussed in Fox, where note 3 at 85-88 supra note 3 at 85-88.

supra note 3 at 85-88.

20. See, e.g., Noyes & Kolb, Modern Clinical Psychiatry 170-80, 212-86 (5th ed. 1958); Bruetsch, Neurosyphilitic Conditions, in 2 American Handbook of Psychiatry 1003-1316 (Arieti ed. 1959). There is, however, evidence that some American psychiatrists regard dealing with organic factors as fraught with the dangers of heresy. Thus some find that "the use of drugs is not necessarily anti-psychologic." McGraw & Oliven, Miscellaneous Therapies, in 2 id. at 1552. That there is at least tension between psychiatrists and other members of the medical profession on the issue of whether the former have unduly neglected the physical endowment of mental patients is illustrated by the following:

the following:

The increased attention of present-day psychiatry to social ills, such as the milder psychoneurotic conditions, juvenile delinquency, and tension in the international field, has created the impression that psychiatry and mental hygiene are mainly concerned with social and psychologic implications. In recent years it has almost been forgotten that psychiatry is also a biological science, dealing with biochemical and pathological processes in the cerebral tissues which may affect mental health.

Bruetsch, Mental Disorders Arising From Organic Disease, in The Biology of Mental Health and Disease 303 (Milbank Memorial Fund ed. 1952).

It is hoped that this work will be of help to internists and to medical students. It is unfortunate that some physicians trained in psychiatry in America will understand little of the contents of this book, but the book is not intended as an internist's revenge on psychiatrists.

ALTSCHULE, BODILY PHYSIOLOGY IN MENTAL AND EMOTIONAL DISORDERS 3 (1953).

21. Proceedings of James Hadfield, 27 How. St. Tr. 1282 (K.B. 1800).

22. Id. at 1319.

23. "We are not here upon a case of insanity arising from the spiritual part of

man, as it may be affected by hereditary taint-by intemperance or by violent passions, man, as it may be affected by hereditary taint—by intemperance or by violent passions, the operations of which are various and uncertain; but we have to deal with a species of insanity more resembling what has been described as idiocy, proceeding from original mal-organization. There the disease is, from its very nature, incurable; and so where a man (like the prisoner) has become insane from violence to the brain, which permanently affects its structure, however such a man may appear occasionally to others, his disease is immovable; and if the prisoner, therefore, were to live a thousand years, he never could recover from the consequence of that day." Id. at 1320-21.

Learning what legal consequences may flow from the presence of biologically conditioned crime presents, in the first instance, a problem of matching symptoms against elements and underlying policies of various legal doctrines. Setting forth on this path of analysis requires the abrupt recognition that individuals with the same disabilities do not invariably exhibit the same symptoms and that common symptoms may appear among individuals with differing disabilities.²⁴ In short, this is a highly individualistic problem, and although it is symptoms that are legally relevant, it is important to note that these are symptoms of individuals much more than they are symptoms of disabilities.

II. IMPAIRED CONSCIOUSNESS

One symptom that is a frequently reported accompaniment of physical disability relates to the patient's perception or awareness or consciousness. Sometimes this symptom is described as a "clouded sensorium" or "disturbances of consciousness."26

The attitude of the law on the relationship of consciousness and penal liability is sometimes forcefully put, as when a California court, in holding it error to refuse to submit to the jury the defense that the defendant was unconscious at the time of the allegedly criminal act, noted:

No principle of criminal jurisprudence was ever more zealously guarded than that a person is guiltless if at the time of his commission of an act defined as criminal he has no knowledge of the deed. . . . "[A]nd to hold that a man shall be held criminally responsible for an offense of the commission of which he was iguorant at the time would be intolerable tyranny."27

A. Scientific Explanations of Consciousness

What consciousness is, which disorders affect it, and what kinds of effects are produced are questions necessarily raised by an attempt to understand the law that has developed on this subject.

Scientific conceptions of consciousness, at the same time relatively homogeneous and relatively vague, include "'awareness' of environment and of self."28 or "a state of sustained awareness of the stream of afferent impulses that reaches the highest level of nervous integration of a given organism,"29

^{24. &}quot;It's more important to know what sort of patient has a disease than what sort of disease a patient has." Parry of Bath, quoted in Sibley, A Reminder of Propertology and Biochemical Individuality 1 (1962).

^{25.} Dewan & Spaulding, op. cit. supra note 4, at 82.
26. Strauss, Epileptic Disorders, in 2 American Handbook of Psychiatry 1109 (Arieti ed. 1959).

^{27.} People v. Freeman, 61 Cal. App. 2d 110, 117, 142 P.2d 435, 439 (1943).

^{28.} Cobb, op. cit. supra note 8, at 111.

^{29.} Id. at 113. (Emphasis omitted.)

or "the experience of being aware of something,"30 or "clear-mindedness,"31 An obviously large dose of subjective and impressionistic description is involved here, although increasing progress is being made in achieving a more precise understanding of at least the manner in which this thing called consciousness is carried on in the human organism.32 At this point, however, scientific knowledge is less than complete.33 Controversy exists, for example. on the question whether there is a seat or core of consciousness in the brain.⁸⁴ It seems to be the consensus, however, that a complex network of neurons making up pathways within the brain-pathways different from those used by the stimuli of sensory perception—constitutes the essential neuroanatomy of consciousness.35 Experiments using the electroencephalograph confirm that this "reticular system" is sensitive to various kinds of pathological states,30 Similarly, clinical experience indicates that clouded consciousness is involved in hypopituitarism,³⁷ epilepsy,³⁸ liver disease,³⁹ head trauma,⁴⁰ and delirium, a symptom complex that may develop from a great many pathological

^{30.} Kubie, Psychiatric and Psychoanalytic Considerations of the Problem of Consciousness, in Brain Mechanisms and Consciousness 444, 446 (Adrian, Bremer, Jasper & Delafresnaye ed. 1954).

31. Noves & Kolb, op. cit. supra note 20, at 109.

32. See Scheibel & Scheibel, The Physiology of Consciousness, 30 American J. of Orthopsychiatry 10 (1960); Kubie, Psychiatric and Psychoanalytic Considerations of the Problem of Consciousness, in Brain Mechanisms and Consciousness 444 (Adrian, Bremer, Jasper & Delafresnaye ed. 1954).

33. "[T]here is every indication that the neural basis of consciousness is a problem that will not be solved quickly." Magoun, The Ascending Reticular System and Wakefulness in id. at 1.

fulness, in id. at 1.

34. Compare Penfield, Studies of the Cerebral Cortex of Man, in id. at 284, 287. ("Most portions of the brain may contribute in some way to normal conscious processes at certain times but the indispensable 'substratum' of consciousness lies outside the cerebral cortex and probably in the diencephalon"), with Cobb, op. cit. supra note 8, at 116 ("Of course there is some localization of 'mind' and 'consciousness.' They are integrated more in some parts of the central nervous system than others—certainly more in upper brainstem and cerebral cortex than in cerebellum and cord. But still, mind is a function of the living brain in action. It is the integration itself, the relationship of one functioning part of the brain to another").

35. The basic work in discovering this "reticular formation" is summarized in Magoun, Non-Specific Brain Mechanisms, in Biological and Biochemical Bases of Behavior 25 (Harlow & Woolsey ed. 1958).

36. When the click-evoked discharge in the auditory cortex and the central brain stem was recorded concurrently... and the effects of drugs or metabolic altera-

stem was recorded concurrently . . . and the effects of drugs or metabolic alterations were tested, the reticular response was greatly diminished or abolished by anaesthetic agents or by interference with the oxygen or sugar supply of the brain

Caughey & Garrod, supra note 10, at 558.

^{38.} See Guttmacher & Weihofen, Psychiatry and the Law 160-61 (1952). 39. Sherlock, Summerskill, White & Phear, supra note 12, at 453. 40. Noves & Kolb, op. cit. supra note 20, at 214-16.

sources.⁴¹ Thus, ample evidence supports the assumption of a close relationship between consciousness disturbance and organic disability.

It is important to note that the term "consciousness" is itself an abstraction having no independent existence and that we experience only "consciousness of something." References to "altered" or "diminished" or "disturbed" consciousness must, therefore, refer either to consciousness that totally lacks awareness of specific items, or to consciousness in which awareness of some or all items is present but imperfect in some sense, or to some combination of both of these kinds of defects.

Closely related is the point that consciousness is a matter of degree; no one is ever completely conscious or completely unconscious.⁴³ One eminent authority puts this as follows:

When the human organism is working well, functioning as a whole, there is probably the highest degree of consciousness, and a feeling of well being and capability. In such a state attention is usually directed to certain objects with neglect of others. Therefore there is never a state that could be called full consciousness. . . . When tired, bored, or slightly poisoned by alcohol, we are suffering from a partial loss of consciousness. From the excited state of great efficiency under stress, through normal work-a-day moods, to states of dullness, coma and stupor, there is a continuous series of states where consciousness is less and less active. . . . Only in deep sleep is the cortex inactive, as judged by the electroencephalograph. There are different degrees of consciousness in sleep. Persons lightly asleep can differentiate between ordinary noises and sounds that may mean danger. Dreaming is a form of consciousness. A sense of time may be carried through hours of sleep, allowing one to wake at a desired hour.44

B. Criminal Liability and Impaired Consciousness

It has already been noted that consciousness is considered a sine qua non to criminal liability.⁴⁵ Several state statutes expressly embody this principle,

^{41.} Noyes and Kolb mention "infections with fever, toxic states, metabolic disturbances (uremia, pellagra, pernicious anemia), cardiac decompensation or head trauma." Id. at 110. Dewan and Spaulding mention "intoxications, metabolic disorders, infections, cardiovascular disorders, trauma, epilepsy and other settings for delirium." Dewan & Spaulding, op. cit. supra note 4, at 88. Some disturbances of consciousness also appear to be attributed to purely psychological eauses. Noyes & Kolb, op. cit. supra note 20, at 112, 502. Query, however, whether such cases involve wholly or primarily psychological experiences as causative agents, as Noyes and Kolb indicate, or whether a breakdown in the organic apparatus of consciousness is translated into the psychic experience and context constituting the outward manifestations. In view of the extensive examination procedures and tests necessary to discover or rule out an organic basis for aberrant behavior, see Dewan & Spaulding, op. cit. supra note 4, at 159-65, it is unlikely that this question can be resolved by scientific experience limited to psychiatric interviews.

^{42.} See Kubie, supra note 30, at 447.

^{43.} The statement in text refers to consciousness in the sense of awareness or attentiveness, although it is probably also true concerning the conscious-unconscious psychoanalytic concept.

^{44.} Cobb, op. cit. supra note 8, at 117-18. 45. See text accompanying note 27 supra.

providing that "all persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act charged without being conscious thereof."46 Liability may similarly be vitiated under a provision, present in many state criminal codes, that "acts committed by misfortune or accident, shall not be deemed criminal, when it appears there was no evil design, intention, or culpable negligence."47

The latter type of statute restates the familiar mens rea principle: if such a provision is to be authority for acquitting on grounds of lack of consciousness, it would be because of an absence of mens rea. If the two types of statutes are interchangeable, as some suggest, then the lack of mens rea might also be involved in the former statutes which deal expressly with consciousness. On the other hand, it may be that the lack of consciousness referred to in the former statutes indicates a lack of actus reus, so that the proper scope of their impact is in those cases in which the mentation necessary for a voluntary act is absent.48

Whether lack of consciousness relates to mens rea or to actus reus, or to both, can be conceptually important to the question whether the legal result is an unconditional acquittal or is acquittal by reason of insanity. This problem arises if one views the defense of insanity solely as a device for negating mens rea. 49 adopting the view that lack of consciousness means lack of actus reus and cannot lead to an insanity verdict. If, however, the conception of insanity is that it can dispute both mens rea and actus reus, 50 then the kind of acquittal required remains unspecified—at least by these conceptualizations. How to resolve this insanity versus outright acquittal question is one of the most difficult areas of the body of law relating to lack of consciousness. Unfortunately, case law history does not seem to provide a clear answer.

^{46.} Cal. Pen. Code § 26(5); see Ariz. Rev. Stat. Ann. § 13-134(2) (1956); Idaho Code Ann. § 18-201(5) (1947); Mont. Rev. Codes Ann. § 94-201(5) (1947); Nev. Rev. Stat. § 194.010(6) (1961); Okla. Stat. Ann. tit. 21, § 152(6) (1958); S.D. Code § 13.0201(6) (1939); Utah Code Ann. § 76-1-41(6) (1953). It might he an enlightening exercise in legal history to determine why all of these statutes are found in Western states and none in the East or Midwest.

47. Ark. Stat. Ann. § 41-116 (1947); see Cal. Pen. Code § 26(6); Colo. Rev. Stat. Ann. § 40-1-10 (1953); Ga. Code Ann. § 26-404 (1953); Idaho Code Ann. § 18-201(6) (1947); Mont. Rev. Codes Ann. § 94-201(6) (1947); Nev. Rev. Stat. § 194.010(7) (1961); Utah Code Ann. § 76-1-41(7) (1953).

48. The draftsmen of the Model Penal Code appear to have taken the position that the Code provision pertaining to consciousness ("voluntary act") deals with an absence of actus reus. Model Penal Code § 2.01, comment 1 (Tent. Draft No. 4, 1955). Gianville Williams finds lack of consciousness to evince an absence of both actus reus and mens rea. Williams, Criminal Law §§ 8, 17, 157 (2d ed. 1961).

49. E.g., Hall, General Principles of Criminal Law 449 (2d ed. 1960).

50. E.g., Mueller, M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity, 50 Geo. L.J. 105-06 (1961). Under this assumption, interesting questions arise concerning so-called strict liability offenses which delete the traditional mens rea requirement but make no apparent attempt also to nullify the need for an actus reus. Absent an actus reus, there should be no strict liability. Thus, if Mr. Mixer were asleep as his horse and wagon trotted through the city of Lynn with its illegal and unknown cargo of liquor, could it not be successfully urged that he was unconscious and therefore incapable in the eyes of the law of committing even a strict liability crime? See Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910).

The first cases involving lack of consciousness to come before the common law judges dealt with situations in which sleep affected consciousness. Wharton divided these situations into "somnolentia, or sleep-drunkenness" and "somnambulism" or sleepwalking.51 Whether the accused produced the harm during the period of semi-wakefulness immediately following sleep⁵² or during an episode of sleepwalking,53 the result has been an acquittal. In these cases, seemingly purposeful action is accompanied by some consciousness, as in The Queen v. Milligan54 and Fain v. Commonwealth,55 in which the defendants seemed to awake, draw their weapons, and kill their victims, engaging in behavior involving complex motor activity and some degree of awareness of the nature of their immediate environment. The law on this subject also quite naturally produced an acquittal in the case in which death ensued from a reflex action during sleep, with no such indicia of wakefulness.⁵⁶ However, except for citation to works on medical jurisprudence asserting that though persons in these sleep-affected conditions can perform complex acts requiring sharpness of perception they do not have "moral agency" or cannot "rightfully" have crimes imputed to them, the opinions do not indulge in an analysis of consciousness.57

Although it is not clear from a reading of the American cases whether the acquittal was by reason of insanity or was witbout qualification, the tendency seems to be a reliance on insanity. Thus, the Texas court in Bradley v. State stated that "somnambulism is recognized as a species of insanity."58 The Kentucky case of Fain v. Commonwealth, on the other hand, makes no mention at all of insanity. A later Kentucky case, Tibbs v. Commonwealth, 59 appears to be the only instance in which the issue of classification was specifically considered. In discussing the appellant's claim that it was error to submit to the jury evidence of somnambulism as proof of insanity, the court concluded: "we fail to see how these facts would constitute any defense other than that embraced in a plea of insanity."60 These cases rely heavily on medical jurisprudence texts that simply discuss the sleep cases under the insanity heading,61 without, however, evincing any awareness that a noninsanity defense might be involved.

^{51.} Wharton & Stillé, Medical Jurisprudence: A Treatise on Mental Unsoundness 463-83 (3d ed. 1873).
52. See, e.g., Fain v. Commonwealth, 78 Ky. 183 (1879); The Queen v. Milligan, Lincoln Aut. Assizes (1836), discussed in Wharton & Stillé, op. cit. supra note 51,

^{53.} Bradley v. State, 277 S.W. 147 (Tex. Crim. App. 1925). 54. Lincoln Aut. Assizes (1836), discussed in Wharton & Stillé, op. cit. supra note 51, at 469-70.

note 51, at 409-70.

55. 78 Ky. 183 (1879).

56. See Regina v. Byron, Winchester Wint. Assizes (1863), discussed in Taylor, Medical Jurisprudence 743-44 (11th Am. ed. 1892).

57. E.g., Fain v. Commonwealth, 78 Ky. 183, 187, 188 (1879).

58. 277 S.W. 147, 149 (Tex. Crim. App. 1925).

59. 138 Ky. 558, 128 S.W. 871 (1910).

60. Id. at 567, 128 S.W. at 879.

61 F.g. Taylor ob cit subra note 56 at 743-44.

^{61.} E.g., TAYLOR, op. cit. supra note 56, at 743-44.

The early English experience, such as the seventeenth century case discussed by Wharton,62 provides no guidance primarily because not until 1800 was it required that a verdict mention insanity if that was the basis of the jury's decision.63 Even reports of the nineteenth century English "sleep" cases—Milligan and Regina v. Byron⁶⁴—make no mention of the form of the verdict or the disposition of the acquitted person. The applicable statutes would have had this question turn on whether the evidence of somnambulism is evidence of insanity; if so, a special verdict and commitment were required.65

Commentators differ on the question whether the sleep cases are instances of insanity. Glanville Williams classifies them as calling for a noninsanity acquittal,68 citing both Byron and several recent nisi prius cases that apparently proceeded on the assumption that this is not insanity. Barrow and Fabing and Weihofen classify sleepwalking as insanity.⁶⁷ Paulsen and Kadish assert that the verdict is unqualified.68 The Model Penal Code favors an unqualified acquittal in these cases.⁶⁹ Glueck discusses somnambulism as a symptom of mental disorder.⁷⁰

The nature of the result in the sleep cases is important today in cases in which lack of consciousness stems from other causes, particularly from various physical disorders. Whether the early common law decisions provide a basis for granting an outright acquittal, rather than acquittal by reason of insanity when consciousness is lacking, becomes a crucial question in the presence of practically universal authority to commit to an institution those acquitted on grounds of insanity.71 It has, in fact, been suggested that one of the major reasons for recent developments on this subject has been the desire of defendants both to rely on abnormal mental conditions for exculpation and, at the same time, to avoid the consequences of being adjudged insane, 72 Anyone who has visited some of the "hospitals" for the criminal insane can readily understand the desire.

This glance at common law antecedents suggests that the very early

^{62.} Levit's Case, discussed in Wharton & Stillé, op. cit. supra note 51, at 466-67. 63. Safe Custody of Insane Persons Charged With Offenses Act, 1800, 39 & 40 Geo.

^{63.} Safe Custody of Insane Persons Charged with Orienses Act, 1000, 0, 6, 10 dec.

3, c. 94.

64. Winchester Wint. Assizes (1863), discussed in Taylor, Medical Jurisprudence

743-44 (11th Am. ed. 1892).

65. See note 63 supra.

66. Williams, Criminal Law § 157, at 483 (2d ed. 1961).

67. Barrow & Fabing, Epilepsy and the Law 92 (1956); Weihofen, Mental Disorder as a Criminal Defense 122 (1954).

68. Paulsen & Kadish, Criminal Law and Its Processes 347 (1962).

69. Model Penal Code § 2.01(2) (b) (Off. Draft 1962). The Model Penal Code is hereinafter cited as MPC. Unless otherwise indicated, all citations are to the 1962 Official Draft. Official Draft.

70. Glueck, Mental Disorder and the Criminal Law 293 (1925).

71. For the various kinds of statutes authorizing commitment see Weihofen, op. cit.

supra note 67, at 366-67.

^{72.} Dixon, A Legacy of Hadfield, M'Naghten and MacLean, 31 Austl. L.J. 255, 257 (1957).

cases could not face the issue because there was no legal or practical difference between the two kinds of acquittals. Moreover, English cases of the last century are not reported with sufficient detail to permit firm conclusions. while the few American cases of that period appear divided in the attitudes they express, with some leaning toward an insanity result. Thus the paucity of cases makes any generalization suspect; in brief, history gives no clear answer.

One thing does appear clearly, however. The opportunity to exploit the ambiguity of these cases as authority for an expanded noninsanity defense has been thus far largely neglected in American legal history. The cases on lack of consciousness not involving sleep are extremely rare. Perhaps the statement from Tibbs v. Commonwealth that somnambulism is a kind of insanity is responsible for this failure to press for recognition of lack of consciousness as an absolute defense. Perhaps also operative is a failure to realize that lack of consciousness has not meant what it seems to say; that is, the individual, at least in the sleep cases, need not be "out cold" in order to claim the defense.

A fairly recent New Jersey case, State v. Bunk, 78 well illustrates the unintentional ambivalence of court and counsel when lack of consciousness is involved. At a trial for felony murder, the claim was made that the defendant suffered from a loss of consciousness due to a diminished blood supply to the brain. Counsel requested an instruction dealing, in one sentence, with lack of mens rea, partial responsibility, and insanity.74 The trial judge instructed on insanity and lack of intent to commit robbery.75 The appellate report does not mention whether the jury (or the judge) was apprised of the possibility that a noninsanity acquittal might be involved.

Some cases can be found, however, recognizing that a disturbed consciousness does present a defense different from insanity.76 But apart from statutory authority, one cannot find any discussion of why this is so, not even a citation to one of the sleep cases. Most of the case law on this subject comes from California where, it will be recalled, a statute specifically exempts unconscious action from liability,77 thus unfortunately obviating the need to make express the reasons for such a separate defense. However, several points can be culled from the California experience. One relates to the burden of proof.

^{73. 4} N.J. 461, 73 A.2d 249, cert. denied, 340 U.S. 839 (1950).
74. "If you find that because of a pre-existing mental, physical or neurological condition the defendant Robert K. Jellison prior to the commission of the alleged crime was rendered unable to form an intent or design to commit a robbery or a killing or incapable of deliberating on such a design, or incapable of appreciating the nature or consequence of his act or to distinguish between right and wrong, then he must be acquitted."

Id. at 473, 73 A.2d at 256.
75. Id. at 474, 73 A.2d at 255.
76. See e.a. State y. Gooze. 14 N.I. Super. 277, 81 A.2d 811 (App. Div. 195)

^{76.} See, e.g., State v. Gooze, 14 N.J. Super. 277, 81 A.2d 811 (App. Div. 1951); People v. Magnus, 92 Misc. 80, 155 N.Y. Supp. 1013 (Ct. Gen. Sess. 1915). 77. CAL. Pen. Code § 26(5); see text accompanying note 46 supra.

In *People v. Hardy*,⁷⁸ the California Supreme Court held that although the prosecution is entitled to rely on a presumption of consciousness, the defendant need only go forward with evidence sufficient to raise a reasonable doubt as to his consciousness; it is not the defendant's duty to overcome the presumption by a preponderance of the evidence.⁷⁹ Thus, once the issue is introduced, the prosecutor must prove beyond a reasonable doubt that the defendant was conscious.

Since California follows the rule that in insanity cases the burden is on the defendant to establish insanity by a preponderance of the evidence, ⁸⁰ a difficult problem arises by virtue of the fact that distinctions must be made between loss of consciousness cases and those in which the actor failed to know the nature and quality of his act. ⁸¹ If the issue is raised whether the defendant was "aware" of what he was doing, the defendant will claim that the evidence relates to his "consciousness" under Section 26(5) of the California Penal Code while the prosecution will assert that it is the defendant's knowledge of the nature and quality of his act that is being discussed; whichever party succeeds in its contention casts the burden of persuasion on the other side. The requirements in California⁸² that the defendant enter a special plea of insanity and that this issue be tried after the trial of the other issues would prevent these opposing burden of proof rules from arising simultaneously, provided, however, that agreement could be reached on the distinction between insanity and lack of consciousness. ⁸³

Whether the facts of a case raise the insanity issue or the lack of consciousness defense is thus crucial in determining at what point the issue is to be tried, which burden of proof rule applies, and which jury may pass on it. The California courts have made it clear that the choice is not entirely dependent upon how the defendant labels his defense. Thus, in *People v. Methever*, a murder case in which the defendant relied both on insanity and lack of consciousness but was refused an instruction on the latter, the California Supreme Court affirmed the conviction, saying: "the court is entirely convinced that subdivision 5 [of section 26] does not contemplate cases of unsound mind,—that is, cases of idiots, lunatics, and insane persons,—but, upon the contrary, contemplates only cases of persons of sound mind,—as, for example, somnambulists, or persons suffering with delirium from fever or

^{78. 33} Cal, 2d 52, 198 P.2d 865 (1948).

^{79.} Id. at 64, 198 P.2d at 871-72.

^{80.} People v. Busby, 40 Cal. App. 2d 193, 204, 104 P.2d 531, 537 (Dist. Ct. App. 1940).

^{81.} Weihofen points out that some of the California cases speak only of the right and wrong test, although a majority of them couple this with the nature and quality test. Weihofen, op. cit. supra note 67, at 133-34.

^{82.} CAL. PEN. CODE §§ 1016, 1026.

^{83.} Even when the distinction is made and separate trials are conducted, it is still possible for the same jury to deal with the complete case. CAL. PEN. CODE § 1026.

drugs."84 The thrust of the Methever decision is that evidence of head trauma and delirium tremens can, as a matter of law, go only to establish that the defendant was of "unsound," rather than "sound," mind. Regrettably, the opinion does not articulate the reasons for equating head trauma and delirium tremens with "idiots, lunatics and insane persons" instead of with the class of disorders represented by "somnambulists, or persons suffering with delirium from fever or drugs." It is clear, however, that this decision is for the judge. not the jury.

A reading of the few cases raising the defense of lack of consciousness sheds some light on which disorders produce lack of awareness—leaving the actor with a sound mind-and which, on the other hand, leave him with an unsound mind. The nature of the disorder appears to lead the courts to allow or disallow the lack of consciousness defense. Thus, in cases in which head trauma alone was relied on85 and in which the claim to acquittal was based on epilepsy,86 the defendant was permitted to raise the unconsciousness defense.

In People v. Hardy, 87 the California Supreme Court permitted a defendant to invoke section 26(5), which exempts unconscious action from liability, notwithstanding that his defense was based on a purely emotional trauma. This decision seems to follow from the acceptance by California courts of "consciousness" as the opposite of the psychoanalytic concept of the unconscious.88 A frequently cited characteristic of emotional disorder is the control of conduct by unconscious (rather than conscious) thought processes.89 The decision in Hardy is paradoxical in that it finds the accused to be of sound mind when his behavior is controlled by unconscious thought processes—a major symptom of mental disturbance.

Unfortunately, practically no discussion is offered on the question why these are cases of sound mind and not the predicates for an insanity verdict.

^{84. 132} Cal. 326, 329, 64 Pac. 481, 483 (1901), overruled on other grounds, People v. Gorshen, 51 Cal. 2d 716, 731-34, 336 P.2d 492, 502-03 (1959). See also People v. Rothrock, 21 Cal. App. 2d 116, 68 P.2d 364 (Dist. Ct. App. 1937).

^{85.} See People v. Cox, 67 Cal. App. 2d 166, 153 P.2d 362 (Dist. Ct. App. 1944).
86. See People v. Nihell, 144 Cal. 200, 77 Pac. 916 (1904); People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (Dist. Ct. App. 1943). See also Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960).

²⁷⁸ F.2d 169 (3d Cir. 1960).

87. 33 Cal. 2d 52, 198 P.2d 865 (1948).

88. In People v. Martin, 87 Cal. App. 2d 581, 587-88, 197 P.2d 379, 382 (Dist. Ct. App. 1948), the court approved the trial court's charge that "if it [the jury] found that at the time 'the conscious mind of the defendant had ceased to operate and that his actions were solely controlled by his subconscious or subjective mind, . . . then you will find that the defendant . . . did not thereby commit a crime even though such an act would constitute a crime if it had been committed by the defendant when he was conscious.'" This, of course, confuses the lack of awareness or perception with the mentation concerning forgotten matter meant by Freud's Unbewnst. See Cobb, Foundations of NEUROPSYCHIATRY 119 (6th ed. 1958).

^{89.} See Freud, A General Introduction to Psychoanalysis 284-96 (Permabook ed. 1958).

In the recent case of Virgin Islands v. Smith, 90 in which the accused allegedly suffered an epileptic attack at the time of the offense, Judge Maris noted that the insanity rule was not involved: "for there was no evidence that the defendant's alleged epileptic seizure was an evidence or result of mental illness."91 Judge Maris implies that the question turns on whether expert testimony proves or negates the mental aspect of a conceded illness. Whether the illness is mental or nonmental hardly seems to be an issue best left for experts to resolve since that is, in fact, merely another way of phrasing the ultimate issue—what is the appropriate disposition? Moreover, whether a disorder directly impinging on brain tissue is to be classified as mental or physical can involve nothing more than a preference between labels or an unarticulated choice between unarticulated policies directed toward achieving some unarticulated end. This is illustrated by a California case, People v. Freeman, in which the appellate court said:

Epilepsy is only one of a number of causes for unconsciousness. It differs from insanity in that the latter generally means an unsoundness of mental condition which modifies, or removes, individual responsibility because it "is such a deprivation of reason that the subject is incapable of understanding and acting with discretion in the ordinary affairs of life." . . . The epileptic displays no such loss of brain function although at the time of or immediately preceding a convulsion he may experience psychical aurae such as a dreamy state or one of terror.92

What are the factors being contrasted here? One could hardly find a more ambiguous analysis. Is it that "mental unsoundness" is meaningfully different from "psychical aurae"? Is it that responsibility is removed in one case and not the other? Is it the absence and presence of "understanding" and "discretion" that is involved? That the court speaks as if there were only one kind of epilepsy (characterized by grand mal seizures) and does not recoguize that there are many epilepsies, among which the temporal lobe type or the psychomotor type are more likely involved in criminal behavior, serves only to illustrate further the lack of intelligible discussion.93

Another important problem is what the jury will be instructed concerning how substantial the impairment must be. Although, as has been noted, some California decisions classify disorders—causing either a sound or unsound mind—as a matter of law, the frequently cited case of Pcople v. Freeman indicates, with a sense of aesthetics tempering the sense of justice, that it is for the jury to determine if an accused of sound mind was sufficiently unconscious to come within the defense.

^{90. 278} F.2d 169 (3d Cir. 1960).

^{91.} Id. at 174.

^{92. 61} Cal. App. 2d 110, 115, 142 P.2d 435, 438 (Dist. Ct. App. 1943).
93. See Strauss, *Epileptic Disorders*, in 2 American Handbook of Psychiatry 1120-22 (Arieti ed. 1959).

When a human being loses consciousness as the result of a diseased condition of his nervous system there is no distinct line over which the mind leaps from the sunlit fields of clear consciousness to the dark canyons of unconsciousness. Surely, there must be, in the case of the epileptic, a period of penumbra when the will is in a state of total or partial paralysis. Under proper guidance the jury should have been permitted to determine whether defendant was suffering a state of clouded understanding or of obstructed will as a result of his epilepsy 94

It should be noted that in Freeman the defendant claimed that he was unconscious at all times during the four mile automobile drive that immediately preceded his accident. That the court rules this to be enough unconsciousness to go to the jury highlights how far from a coma or stupor the accused may be and still be legally unconscious. These cases raise almost as many questions as they provide answers. It appears that a claim of "blackout," substantiated by medical evidence of a disorder capable of affecting consciousness, constitutes enough to get to the jury. But if it is true that the defense is available only when the defendant has a "sound mind," may an accused avail himself of that lack of consciousness that arises when "tired, bored, or slightly poisoned by alcohol?"95 Or is it absolutely necessary that there be some pathology underlying the diminished consciousness? Is one "at fault" in being tired or bored, but not when afflicted with epilepsy? If psychic pathology will suffice as the cause of the blackout, what is the difference between this and loss of consciousness in an "unsound mind"?

THE MODEL PENAL CODE POSITION

Recent legislative activity evinces little, if any, awareness of the problems of the automatism defense. The Wisconsin Criminal Code of 195596 touches the matter only in its definition of crime as including "conduct."97 Insofar as this codifies the common law requirement of an actus reus it merely restates the basis for raising the issue of whether lack of consciousness negates the occurrence of an act. The Illinois Criminal Code of 1961, requiring a "voluntary act" as a material element of every offense, does the same thing, only more explicitly.98 The question whether a lack of consciousness can negate the will or volitional component of the actus reus99 other than in an insanity defense is left wholly unanswered in both states.

^{94. 61} Cal. App. 2d at 117, 142 P.2d at 439.

^{94. 61} Cal. App. 2d at 117, 142 P.2d at 439.
95. Cobb, op. cit. supra note 88, at 117.
96. Wis. Stat. Ann. §§ 939.01-47.15 (1958).
97. "A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." Wis. Stat. Ann. § 939.12 (1958).
98. "A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing." Ill. Ann. Stat. ch. 38, § 4-1 (Smith-Hurd 1961).
99. See Holmes, The Common Law 54 (1881).

The Model Penal Code does deal directly with this issue. Section 2.01 provides for certain exclusions from liability that amount to a noninsanity defense:

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of

this Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic

suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

The exclusion in section 2.01(2)(b) of sleep cases from liability, of course, follows the case law. By providing for complete acquittal rather than an insanity verdict, the Code resolves the question not clearly resolved by early cases. The provisions relating to reflex and convulsion in subsection 2(a) would cover the same situations as in 2(b), i.e., when the actor is not capable of controlling the movements of his body.100

No rationale is given for granting complete exculpation to these cases in subsections 2(a) and 2(b) instead of classing them as instances of irresponsibility (insanity) under section 4.01 of the Code. The Comment to section 2.01 merely says that "any definition must exclude a reflex or convulsion."101 In discussing whether states of altered consciousness are to call for not quilty or irresponsible results, the Comment mentions two factors that may also have been operative in the policy of summarily excluding reflexes and convulsions. One of these is whether the condition producing the unconsciousness is recurrent; the other is whether the condition would qualify as "mental disease or defect" under either the Model Penal Code or prevailing law. 102 That is, the Comment appears to be influenced by the chance that reflexes, convulsions, and unconscious states may be such isolated occurrences in the life of the actor as to render unnecessary and unfair the consequence of an insanity verdict; furthermore, these conditions may not satisfy the elements of the insanity defense. Little choice remains, therefore, but to grant complete immunity from liability.

Convulsions, however, unquestionably may be, and frequently are, recurrent in such conditions, for example, as epilepsy. Unconsciousness, too, may

^{100.} A reflex is "an involuntary, invariable, adaptive response to a stimulus." BLAKISTON'S NEW GOULD MEDICAL DICTIONARY (2d ed. Hoerr & Osol 1956). A convulsion in "an involuntary general paroxysm of muscular contraction. It is either tonic (without relaxation) or clonic (having alternate contraction of opposite groups of muscles)." Ibid. 101. MPC § 2.01, comment 3 at 121 (Tent. Draft No. 4, 1955).

be recurring, as when it is produced by an untreated and severe infection or metabolic disease. 103 Whether conditions producing convulsions would qualify as "mental disease or defect" is indeed a difficult question to resolve under prevailing law, 104 but it is curious that no resolution is offered by the Code, especially in view of the fact that it does undertake at least a partial definition of this phraseology in its responsibility section. 105

In regard to the "bodily movement during unconsciousness" of section 2.01(2)(b), the Comment notes the probability that the unconscious actor has that kind of lack of knowledge that would bring him within the irresponsibility provisions, provided the mental disease or defect requirement is satisfied. 108 Extant discussion of the legal meaning of unconsciousness also frequently equates it with the nature and quality standard of the insanity test. 107 This, of course, makes it all the more important to find a satisfactory means of drawing a distinction between the two defenses. 108

THE BRITISH EXPERIENCE WITH THE AUTOMATISM DEFENSE

Thus stands the American law in regard to unconsciousness and criminal liability. I shall, in concluding, make further comment on the state of the law, but at this point it is instructive, and somewhat comforting, to note that these problems relating to the automatism defense are not peculiar to American law. In fact, the whole subject is much more substantially developed by British writers, both on and off the bench. This is not to say that the problems have been satisfactorily resolved or that all of them have been squarely faced. As shall be seen, the experience of our overseas brethren has been extensive, but not exhaustive.

Although recent developments in Great Britain have had the same kind of sleep-associated precedents to rely on as the American law, 109 an express reluctance to go further than the development represented by the sleep cases

^{103.} See Ewalt, Strecker & Ebaugh, Practical Clinical Psychiatry 101 (1957). 104. The California "sound mind"—"unsound mind" problem is one indication of the difficulty.

^{105. &}quot;As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MPC § 4.01(2).

106. MPC § 2.01, comment 3 at 121 (Tent. Draft No. 4, 1955).

107. See, e.g., Corder v. Commonwealth, 278 S.W.2d 77, 80 (Ky. Ct. App. 1955) (dissenting opinion); cf. Edwards, Automatism and Criminal Responsibility, 21 Modern L. Rev. 374, 384 (1958).

108. The Comment to section 2.01 goes on: "The draft does not define 'unconsciousness' and thus does not attempt a legislative resolution of the issue. . . But any jurisdiction that determines that these cases of active automatism should be judged by the responsibility criteria alone can accomplish that result legislatively by use of the alternative suggested, substituting 'coma' for 'unconsciousness' in paragraph 2(b)." MPC § 2.01, comment 3 at 121-22 (Tent. Draft No. 4, 1955). The final Official Draft of the Code adopted in 1962, however, eliminates the alternative so that the section reads as set forth in text following note 99 supra. Thus a decision was reached that there should be no classification of the unconsciousness cases under the rules of irresponsibility. Why? be no classification of the unconsciousness cases under the rules of irresponsibility. Why? 109. See text accompanying notes 62-65 supra.

has been exhibited.110 Because there are no statutes equivalent to those expressly exempting unconscious action from liability,111 the law is primarily the product of judicial reaction to the ingenuity of counsel pressing a noninsanity defense.

Several principles emerge from the British cases. Most basic is the continued affirmation of the distinction between the common law defense of lack of consciousness and the defense of insanity. 112 Also, paralleling the California rule¹¹³ are the requirements that the defendant submit evidence that he lacked consciousness but that the prosecution must prove beyond a reasonable doubt that he acted with consciousness.114

Although it is clear that a distinction must be made between the loss of awareness that leads to outright acquittal and that which leads to a Broadmoor commitment at her Majesty's pleasure, this problem remains puzzling and troublesome. One may conveniently pick up the threads with Regina v. Charlson. 115 a 1955 case in which the defendant was charged with several counts of assault. 116 Defendant relied on the defense that at the time of the acts he was suffering from a cerebral tumor which produced a diminished consciousness automatism; also, testimony was offered that he was not suffering from any mental disease. Barry, J., told the jury:

Therefore . . . you have to ask yourselves whether the accused knowingly struck his son, or whether he was acting as an automaton without any knowledge or control over his acts. . . . Did he intend to do it, and did he realize he was doing an unlawful act? If he did, then he is guilty of the third charge at least. On the other hand, you may consider that he may not have known what he was doing at all, although perhaps he remembered it in a vague sort of way. If you think it was purely automatic action for which he had no responsibility at all and over which he had no control then the proper verdict would be "not guilty."117

Charlson was acquitted.

^{110.} E.g., Reading, C.J., declared in Rex v. Lesbini, [1914] 3 K.B. 1116, 1120, that the courts should not be "inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequence of his acts." More than fifty years later, the Chief Justice of the High Court of Australia, in reviewing the automatism cases, decried the fact that the weakening had in fact taken place. "This seems to me something more than an inelegantia juris in the criminal law relating to irresponsibility. It is still another discreditable feature in a discreditable chapter of the law." Dixon, supra note 72, at 261.

111. See note 46 supra and accompanying text.
112. See Regina v. Charlson, [1955] 1 Weekly L.R. 317 (Chester Assizes); Regina v. Minor, 112 Can. Crim. Cas. Ann. 29, 33 (Sask. Ct. App. 1955); accord, Bratty v. Attorney-General for Northern Ireland, [1961] 3 Weekly L.R. 965 (H.L.).

113. See text accompanying notes 78-80 supra.
114. See discussion of the cases in Williams, Automatism, in Essays in Criminal Science 345 (Mueller ed. 1961).
115. [1955] 1 Weekly L. R. 317 (Chester Assizes).
116. Defendant was accused of causing grievous bodily harm with intent to murder, causing grievous bodily harm with intent to cause grievous bodily harm, and unlawful wounding (a strict liability offense). Id. at 317.

wounding (a strict liability offense). Id. at 317. 117. Id. at 321-22.

One year later, another defendant was similarly charged with causing grievous bodily harm—this time to his wife. He sought to avoid commitment to Broadmoor by alleging that he committed the act in a state of lapsed consciousness caused by arteriosclerosis. But, unlike Charlson, he did not succeed. Here, however, the Crown introduced expert testimony that his arteriosclerosis produced a disease of the mind. The court refused to instruct the jury on the automatism defense and put to them only the question of insanity. The defendant was found "guilty but insane," and this was upheld on appeal.118 During the ensuing few years, several cases arose in which lack of consciousness was pleaded as a distinct defense. 119 But none of the cases produced principles by which disease of the mind could be distinguished from sane automatism.120

In 1961, however, a case involving the defense of automatism arrived at the House of Lords and the problems received the consideration of that high tribunal. Bratty v. Attorney-General for Northern Ireland¹²¹ was an appeal from a conviction in a murder case in which the accused raised both automatism and insanity as defenses. The only evidence on both defenses, apart from that contained in Bratty's statements, was that he was suffering from psychomotor epilepsy at the time he strangled the victim; 122 Bratty alleged: "I had some terrible feeling and then a sort of blackness. . . . I don't think it would have happened only that terrible feeling came over me at that time. I don't know really what caused it all."123 His testimony "described the terrible feeling that came over him as a feeling he wanted to put his arms round the girl."124

The trial judge refused to instruct on the automatism defense and the jury, in returning a conviction, rejected the insanity defense concerning which they had been instructed. The House of Lords, in upholding the conviction, explained that the trial judge was correct in refusing the automatism instruction since the defendant had not laid a proper foundation for

^{118.} Regina v. Kemp, [1957] 1 Q.B. 399 (1956).
119. E.g., Hill v. Baxter, [1958] 1 Q.B. 277 (1957); Regina v. Cottle, [1958]
N.Z.L.R. 999 (Ct. App.); Regina v. Schoonwinkel, [1953] 3 So. Afr. L.R. 136; Regina v. Carter, [1959] Vict. L.R. 105 (Sup. Ct. 1958); see Scoble, Amnesia, Automatism and Insanity, 79 S.A.L.J. 338 (1962).

^{120.} In Regina v. Cottle, supra note 119, the New Zealand court noted that disease of the mind is "a term which defies precise definition and which ean comprehend mental derangement in the wide sense whether due to some condition of the brain, or whether due to the effect upon the brain of something outside the brain, e.g., arteriosclerosis." Id. at 1011. The court also noted that somnambulism may arise from an "abnormality of mind." Id. at 1007. Regina v. Carter, supra note 119, seemed to permit the defense on facts similar to those in People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948), discussed at text accompanying notes 87-89 supra, but again there is no discussion of the implications of permitting automatism to be raised on the basis of a purely emotional trauma.

^{121. [1961] 3} Weekly L.R. 965 (H.L.).

^{122.} Id. at 983.

^{123.} Id. at 967.

^{124.} Ibid.

it.125 The decision contains no hint that Bratty's testimony does not amount to a claim of lack of consciousness. His statement seems to have been accepted as equivalent to a claim of "blackout." The defect in the foundation was rather a lack of any kind of medical evidence to support the claim of "blackout." Why was the evidence that Bratty suffered from psychomotor epilepsy insufficient satisfaction of this requirement? The difficulty was that all the doctors who testified, including those called by Bratty, "agreed that psychomotor epilepsy is a defect of reason due to disease of the mind."126 Therefore. the evidence showed only that Bratty did not know the nature and quality of his act because of a defect of reason due to disease of the mind; in short, only evidence of insanity, and no evidence at all of automatism, was presented.

This approach of the House of Lords appears to be a neat and clear-cut resolution of the problem; similar to the position of Judge Maris in the Smith case, 127 the answer depends on the persuasiveness of the expert evidence introduced. But, in Bratty, Lord Denning also notes that the question whether the evidence concerning the cause of the defective consciousness is evidence of disease of the mind or is evidence of automatism is a question for the judge. 128 This indicates that the experts are not to have their say in the ultimate question of insanity or acquittal, but that some policy of the law is to be the final arbiter. Most significantly, Lord Denning discusses the principles whereby this policy choice is to be made:

The major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in Charlson's case, Barry J. seems to have assumed that other diseases such as epilepsy or cerebral tumor are not diseases of the mind, even when they are such as to manifest themselves in violence. I do not agree with this.¹²⁹ It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.136

The first distinction made is between those diseases that are classed as psychoses and those diseases that are not. In the case of psychotic disease, the result is always to be not guilty by reason of insanity rather than acquittal. This is a somewhat gratuitous proposition since in none of the cases involving

^{125.} Id. at 983.

^{126.} Id. at 983.

^{126.} Id. at 983.

127. See text accompanying notes 90-92 supra.

128. [1961] 3 Weekly L.R. at 981.

129. Here, of course, Lord Denning also disagrees with the American decisions treating epilepsy as a proper basis for the lack of consciousness defense. See note 86 supra and accompanying text.

130. [1961] 3 Weekly L.R. at 981. (Footnote added.) The Royal Commission on Capital Punishment also classified epilepsy and cerebral tumor as mental diseases, but only as examples of when mental disease is present for legal purposes without psychosis. The commission expressed no view as to nonbrain-located disease. See Royal Commission on Capital Punishment, 1949-1953 Report, CMD. No. 8932, at 73 (1953).

automatism discussed in the *Bratty* opinion was the accused psychotic. No reason is directly given as to why psychotic cases are to be thus disposed of, except perhaps that the medical terminology and the legal terminology happen to coincide exactly in the phrase "mental disease." Given the difference in the law between disease-insanity and disease-automatism, it is clear that the question of which disposition is most suitable in any given case or class of cases cannot be resolved simply on the basis of verbal congruity.

It may be that the rationale governing Lord Denning's classification of the psychoses as giving rise only to the insanity defense can be inferred from the discussion of the standards governing the choice of which nonpsychotic diseases give rise to automatism and which to insanity. Two preliminary points must be noted in regard to the opinion's discussion of these non-psychotic diseases. One is that these diseases need not be centered in the brain itself. This limitation might, at first, be implied from the examples given of epilepsy and cerebral tumor, but Lord Denning's approval of the decision in Regina v. Kemp, 131 classifying arteriosclerosis as a mental disease, denies this limitation. The starting point, therefore, for identifying the nonpsychotic diseases that can lead only to an insanity verdict (provided the jury accepts the evidence) appears to be that there is a disease that may or may not be a disease of brain tissue but is one that indirectly affects brain functioning and thereby affects behavior.

Second, it does not appear fair to tax Lord Denning with circuitous reasoning in the penultimate sentence of the quotation given. Although he says "any mental disorder," he should be taken as referring to disease that influences behavior through direct or indirect influence on the brain, rather than to that "mental disorder" that is a prerequisite for the insamity defense.

We now come to the tests given for determining which of these "mental disorders" are in fact the mental diseases or defects raising the insanity defense. Violence and proneness to recur are the telltale signs. It is not clear whether the need for hospital detention is itself a third factor or is another way of putting the need to prevent violence and recurrence. It will be treated as a third factor merely in order to evaluate its aptness. It seems that the three factors do not afford a completely satisfactory explanation for forging an inevitable link between psychosis and an insanity verdict and for erecting a barrier between psychosis and an automatism acquittal. This is so because the considerations that Lord Denning finds pointing toward an insanity verdict may not always be present in psychoses, in either an absolute or a relative sense. To some psychotics, none of these factors may apply. As to violence, what is the scientific authority for the proposition that violence and psychosis are intrinsically associated, or that the incidence of violence

among psychotics is significantly higher than among those with the non-psychotic diseases as to which automatism acquittals are the proper result? One has no hope of answering this latter query without having some idea of which nonpsychotic diseases are "automatism diseases." Evidently, epilepsy, arteriosclerosis, and cerebral tumor are not.

Proneness to recur, the second factor, is a somewhat ambiguous concept, referring either to the likelihood of the disease itself returning or, on the other hand, to the likelihood of certain symptoms returning in an individual with a chronic disease. In all probability, Lord Denning is making reference to the latter meaning since the former alternative means proneness to recur after complete cure, or spontaneous remission. In other words, the cyclical process being evaluated is not the coming and going of the disease, but rather the recurrence of symptoms. One expects that Lord Denning disapproves of Charlson not because Judge Barry underestimated the probability of a "cured" epileptic finding himself once again with epilepsy or the probability of a cerebral tumor returning after once having "disappeared." In general, it is a more reasonable assumption that epilepsy and cerebral tumor do not come and go; but, some of the symptoms associated with these disorders do. Although it is true that grammatically Lord Denning speaks of "any mental disorder which . . . is prone to recur," the above considerations indicate that this is either unintended phrasing or is evidence of unawareness that ambiguity is involved.

In the event that Lord Denning did purposefully refer to diseases having proneness to recur, the linkage of psychoses and insanity is indeed difficult to understand. True cures and remissions of psychoses are so rare that a decision to the effect that when a psychotic disease does disappear it is, nonetheless, invariably prone to recur requires some support in scientific experience to be acceptable.

If it is, however, *symptoms* whose proneness to recur prompts the linking of psychoses with insanity, the question arises as to which symptoms we are concerned with. It may be that violent behavior is the symptom so that the test amounts to requiring at least one instance of violence and some likelihood that violence will be repeated. This test would be eminently sensible except that it is too limited in its exclusion of nonviolent symptoms, such as a need for consensual sex activity with children.

Thus, in seeking to determine why psychosis is never the basis for an automatism defense, we are led to believe that two considerations are operative. One is that the psychoses are those diseases that are, with a maximum of medical certainty and unanimity, classed as mental diseases. This, of course, does not mean that cures are more available for these diseases than for others; psychiatric experience teaches quite the opposite. It does mean

that the abnormality is easily recognized in these cases. The second consideration may be that a relatively high likelihood of repeated violence is assumed in regard to psychoses, which makes enforced hospitalization a propitious outcome.

Turning from psychoses to nonpsychotic diseases, it can be seen that Lord Denning has expressly invoked the violence-recurrence-hospitalization triumvirate as the means for distinguishing automatism-disease from insanity-disease. As has been indicated, it is more reasonable to take "recurrence" as referring to symptoms and not to the disease itself. It is thus violence and high likelihood of more violence that makes the hospital apt. This leaves for the automatism defense those diseases in which violence is absent. This is not entirely acceptable since nonviolent offenses, e.g., consensual sex activity with young children, theft, etc., may be as symptomatically significant of a need for hospitalization as is violence. It is not realistic to expect violence to be invariably a manifestation of serious disease. If it is important that those who commit crimes because of their diseases receive effective treatment, then nonviolent crime can hardly be summarily excluded. But if this is so, what is left of automatism? Only cases of unconsciousness from nondisease, such as head trauma, would qualify.

V. Conclusion

It has been seen that attempts to distinguish the automatism, or "unconsciousness," defense from the insanity defense are difficult, and no satisfactory solution has yet been suggested. On the premise that penal sanctions are to be applied only to those with an acknowledged capacity for choice, it is obvious that much the same rationale behind the insanity defense applies to persons whose bodily disorders impel them to cause criminal harm. One is hard pressed, in fact, to find the considerations that separate the automatism defense from the insanity defense. Three considerations are afoot concerning choice of result. One is that the "fault" basis on which ordinary convictions are predicated is glaringly absent in crimes committed "unconsciously." But society must be protected from those whose ailments threaten it. Something should be done; the public health quarantine concept might properly be invoked here. Third, however, is the long overdue obligation to recognize that policies based upon providing cures and treatment should be based on more than good intentions. A wholesale expansion of the class declared irresponsible by reason of insanity is itself wholly irresponsible unless meaningful steps are taken concurrently to provide the personnel, facilities, and techniques whereby the therapeutic assumptions can be implemented. The class of offenders discussed herein poses special problems of this nature. It would make little sense to declare insane a person whose hypoglycemia is at the root of his crime, and then send him to the "hospital" for the criminal insane in order that a social worker or psychologist can treat him as if the roots were all social or psychological. It would be equally futile to commit him to the care of a psychiatrist who is so "dynamic" that all behavioral problems are a priori deemed psychogenic.

Whether there is a rational basis for the automatism defense at all constitutes the most fundamental problem. Certainly there is no clear historical basis for it. The question is unduly difficult by virtue of the black and white choices involved—criminality, insanity, or acquittal. Perhaps here is an apt place to consider the applicability of the partial responsibility concept, whereby involuntary medical treatment would be the consequence of adjudicating automatism, sane or insane. Whether to use in-patient or out-patient facilities could turn on the singularities of each case, avoiding the fallacy of treating diseases instead of people. On the other hand, here it is also apt to invoke comprehensive pre-trial procedures that could avoid the disadvantages to all parties of a criminal trial while at the same time permitting fructification in the medical treatment that promotes all interests.

In any event, the whole problem is badly in need of informed legislative consideration, for case law developments indicate strongly that a properly planned legal order for dealing with automatism problems is beyond the creative capacity of any court.

^{132.} The best available discussion of the potential of the partial responsibility idea is Glueck, Law and Psychiatry: Cold War or Entente Cordiale? 23-30, 110-12 (1962). See also Edwards, *Diminished Responsibility*, in Essays in Criminal Science 301 (Mueller ed. 1961).